88-1300

No.

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR BOHEMIAN SAVINGS AND LOAN ASSOCIATION, PETITIONER

v.

JOHN V. CAPOZZI, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JORDAN LUKE
General Counsel
Federal Home Loan Bank Board
Washington, D.C. 20552

56pp

QUESTION PRESENTED

The Federal Savings and Loan Insurance Corporation (FSLIC), as conservator of a FSLIC-insured state-chartered institution, brought suit in federal court against former directors of the institution to recover damages for their investments in real estate, extensions of loans, execution of contracts, and management of the institution in violation of state and federal law. The question is whether the district court had jurisdiction under 12 U.S.C. 1730(k)(1) or 28 U.S.C. 1345.

PARTIES TO THE PROCEEDING

The petitioner in this case is the Federal Savings and Loan Insurance Corporation, as receiver for Bohemian Savings and Loan Association. The principal respondents in this Court—the parties directly affected by the jurisdictional issues—are Vincent J. Bommarito, Thomas F. Cline, Daniel L. Dierdorf, and Robert C. Fechner. The other, nominal respondents—who were nominal appellees in the court of appeals—are John V. Capozzi, Margaret A. Capozzi, Dan L. Wood, Floyd L. Shearin, Jacob Fishman, and Gregory Saban.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Acting Solicitor General, on behalf of the Federal Savings and Loan Insurance Corporation (FSLIC), petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 855 F.2d 1319. The opinion of the district court (App., *infra*, 17a-39a) is reported at 653 F. Supp. 591.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1988. App., *infra*, 40a. A petition for rehearing was denied on November 4, 1988. App., *infra*, 41a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 102(a) of the Financial Institutions Supervisory Act of 1966, 12 U.S.C. 1730(k)(1), provides:

> Notwithstanding any other provision of law, (A) the Corporation [FSLIC] shall be deemed to be an agency of the United States within the meaning of section 451 of title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided,* That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States.

Section 1345 of Title 28, U.S. Code, provides:

> Except as otherwise provided by Act of Congress, the district court shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

STATEMENT

This case was brought in federal district court by the FSLIC, as conservator for a FSLIC-insured, state-chartered savings and loan association, to recover from former directors of the insolvent institution damages caused by their violations of federal laws applicable to federally insured thrifts and by their breaches of fiduciary and contractual duties. The FSLIC seeks review of the Eighth Circuit's decision that neither 12 U.S.C. 1730(k)(1) nor 28 U.S.C. 1345 grants the federal courts jurisdiction over the case.

1. Under 12 U.S.C. 1464(d)(6)(A) and 1729(c), the Federal Home Loan Bank Board (Bank Board) is empowered in certain circumstances to appoint the FSLIC to be the conservator or receiver for a state-chartered savings and loan association (thrift) whose accounts are insured by the FSLIC. On January 30, 1986, the Bank Board, based on a determination of insolvency, appointed the FSLIC to be the conservator for Bohemian Savings and Loan Association (Bohemian) of St. Louis, Missouri. Bohemian was chartered by the State of Missouri, and its accounts were insured by the FSLIC under 12 U.S.C. 1726.

Immediately after being appointed conservator, the FSLIC brought this action in the United States District Court for the Eastern District of Missouri. The complaint, as amended, stated claims by the FSLIC both in its capacity as conservator and in its separate corporate capacity. In its capacity as conservator, the FSLIC sought more than $75 million in damages from respondents, who are former directors and officers of and a former attorney for Bohemian.

The FSLIC as conservator alleged, among other things, that the director defendants violated numerous federal regulations that are designed to ensure the sound manage-

ment of FSLIC-insured thrifts. In particular, the complaint alleged that the director defendants violated their duties under 12 C.F.R. 563.9-3(b) (lending limits), 563.9-8 (investments), 563.17(a) (safe and sound management policies), 563.17-1(c)(1) (loan requirements), 563.43(b) (loans to affiliated persons), 523.12(a) and (b) (statutory reserves and net worth), 523.11 (liquidity), 563.17-1(c) (accounting and records), 563.37 (operation of service corporation), 563.39 (unsafe and unsound employment contracts), and 563.41(c)(iii) (purchasing property from affiliated persons). The FSLIC as conservator alleged that those violations gave rise both to implied federal causes of action and to state-law causes of action for breach of fiduciary and contractual duties.

Jurisdiction over the claims brought by the FSLIC as conservator was invoked under both 12 U.S.C. 1730(k)(1) and 28 U.S.C. 1345. In pertinent part, Section 1730(k)(1) states:

> Notwithstanding any other provision of law, (A) the Corporation [FSLIC] shall be deemed to be an agency of the United States within the meaning of section 451 of title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; * * * *Provided*, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States.

The FSLIC alleged that the proviso just set forth does not apply to this case and, therefore, that the case comes within Clause (B)'s grant of jurisdiction over all civil suits to which the FSLIC is a party. The FSLIC also alleged—relying on Clause (A)'s declaration that the FSLIC is an agency for purposes of 28 U.S.C. 451 and on the statutory provision that authorizes the FSLIC to sue and to be sued, 12 U.S.C. 1725(c)—that the district court had jurisdiction under 28 U.S.C. 1345, which grants jurisdiction over any civil suit brought by "any agency * * * expressly authorized to sue by Act of Congress."

2. Respondents Cline, Fechner, and Bommarito, all of whom are former directors of Bohemian, moved to dismiss the claims made by the FSLIC as conservator, arguing that the court lacked jurisdiction over those claims because they fall within the jurisdiction-limiting proviso of Section 1730(k)(1). The district court granted the motion. App., *infra,* 17a-39a. The court dismissed the claims brought by the FSLIC as conservator against the three moving parties and against respondent Dierdorf, who was also a director of Bohemian. *Id.* at 39a.[1]

The district court first concluded that the FSLIC is an "agency" within the meaning of Clause (A) only in its corporate capacity, not in its capacity as conservator, receiver,

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[1] The court held that there was pendent jurisdiction (pendent to certain federal-law claims and certain claims by the FSLIC in its corporate capacity) over certain state-law claims brought by the FSLIC as conservator against respondents John and Margaret Capozzi, respondent Wood, and respondent Fishman. See App., *infra,* 36a-39a. Jurisdiction over those claims was not at issue in the court of appeals and is not at issue in this petition. The two other respondents, Shearin and Saban, both of whom were outside directors, were dismissed without prejudice at the instance of the FSLIC. Only the claims against respondents Cline, Fechner, Bommarito, and Dierdorf were at issue in the court of appeals and are at issue here.

or legal custodian. Therefore, the court ruled, 28 U.S.C. 1345 does not confer jurisdiction over the claims asserted by the FSLIC in its capacity as conservator in this case. App., *infra,* 20a-23a. To determine whether it had jurisdiction over those claims, the court accordingly turned to Clause (B) of Section 1730(k)(1), which states that all civil cases to which the FSLIC is a party are deemed to arise under federal law. That clause confers federal jurisdiction here, the court observed, unless Section 1730(k)(1)'s proviso applies. App., *infra,* 23a.

The district court ruled that the proviso applies to, and therefore deprives the federal courts of jurisdiction over, the FSLIC's claims as conservator (for a state-chartered thrift) against respondents Cline, Fechner, Bommarito, and Dierdorf. App., *infra,* 23a-34a. The court concluded that those claims "involve[ ] only the rights or obligations of investors, creditors, stockholders, and [the failed thrift]" (Section 1730(k)(1)), notwithstanding that they involve the obligations of directors, who are not listed in the proviso. In the court's view, it was sufficient that the claims at issue asserted rights of the failed thrift and that any recovery would redound to the benefit of investors, creditors, and stockholders. App., *infra,* 24a-26a. The court also concluded that the claims "involve[ ] only * * * rights or obligations * * * under State law" (Section 1730(k)(1)), notwithstanding that the claims involve the defendants' obligations under federal regulations. In the court's view, it was sufficient that the claims "arise under" state law, not federal law. App., *infra,* 27a, 35a-36a.[2] In short, the district court concluded that the claims against respondents Cline, Fechner, Bommarito, and Dierdorf

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[2] The court concluded that the FSLIC as conservator has no implied right of action under any of the federal regulations that the defendants allegedly violated. App., *infra,* 27a-34a.

satisfy all of the conditions of the proviso and that those claims are therefore outside its jurisdiction.

3. The court of appeals affirmed. App., *infra,* 1a-16a. The court first ruled, contrary to the ruling of the district court, that the FSLIC is an "agency" under Clause (A) of Section 1730(k)(1) regardless of the capacity in which it has filed its claims—*i.e.,* whether it is acting in its capacity as insurer, regulator, conservator, or receiver. App., *infra,* 3a-4a. Nevertheless, following the Seventh Circuit's decision in *FSLIC* v. *Ticktin,* 832 F.2d 1438, 1443-1444 (1987), cert. granted, No. 87-1865 (Oct. 3, 1988), the court held that 28 U.S.C. 1345 does not furnish an independent basis of jurisdiction over claims that come within Section 1730(k)(1)'s proviso, because Section 1730(k)(1) sets forth a comprehensive scheme for jurisdiction in cases involving the FSLIC. App., *infra,* 4a-8a.

The court of appeals then ruled that the proviso applies to the FSLIC's claims as conservator against respondents Cline, Fechner, Bommarito, and Dierdorf—the only claims that were before the court. Following the *Ticktin* decision (832 F.2d at 1444), the court of appeals agreed with the district court that those claims "involve[ ] only the rights or obligations of investors, creditors, stockholders and [the failed thrift]" because—regardless of who the defendants are—the claims were brought to enforce the rights of the thrift. App., *infra,* 9a-10a. The court also agreed with the district court and with the *Ticktin* decision (832 F.2d at 1445-1446) that, notwithstanding the defendants' alleged violations of federal regulatory obligations, the claims at issue involve only "rights or obligations * * * under State law" because the claims "arise under" state law, not federal law. App., *infra,* 10a-12a.[3] The court of

[3] The court of appeals concluded that the FSLIC has no implied right of action as conservator under the federal regulations that are at

appeals accordingly held that the proviso bars federal jurisdiction over the claims before it.

DISCUSSION

The FSLIC submits that its claims as receiver against respondents Cline, Fechner, Bommarito, and Dierdorf are within the jurisdiction of the district court under both 12 U.S.C. 1730(k)(1) and 28 U.S.C. 1345.[4] The court of appeals rejected that submission. The court ruled, contrary to the FSLIC's arguments, (a) that Section 1730(k)(1)'s proviso limits the federal agency jurisdiction conferred by 28 U.S.C. 1345, (b) that the proviso applies even to claims that involve the obligations of persons, such as directors, who are not listed in Section 1730(k)(1)'s proviso, and (c) that the proviso applies even to claims that involve obligations under federal law, as long as the claims arise under state law.

The three issues that the court of appeals ruled on in this case are currently before the Court in *FSLIC* v. *Ticktin,* No. 87-1865, which is scheduled for argument on February 27, 1989. As we explained in our brief in *Ticktin*, the courts of appeals are divided over whether there is federal jurisdiction over claims like those brought in this case against respondents Cline, Fechner, Bommarito, and Dierdorf. The petition in this case should be held for disposition in light of the Court's decision in *Ticktin*.

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issue and that there is no basis for recognizing a federal common law cause of action in the present setting. App., *infra,* 12a-15a.

[4] On December 13, 1987, after the case was submitted to the court of appeals but prior to the court's decision, the Bank Board replaced the conservator and appointed the FSLIC as receiver for Bohemian.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's decision in *FSLIC* v. *Ticktin*, No. 87-1865.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JORDAN LUKE
General Counsel
Federal Home Loan Bank Board

FEBRUARY 1989

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 87-1696

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS CONSERVATOR FOR BOHEMIAN SAVINGS AND LOAN ASSOCIATION, APPELLANT

v.

JOHN V. CAPOZZI, MARGARET A. CAPOZZI, DAN L. WOOD, VINCENT J. BOMMARITO, THOMAS F. CLINE, DANIEL L. DIERDORF, ROBERT C. FECHNER, FLOYD L. SHEARIN, JACOB FISHMAN, AND GREGORY SABAN, APPELLEES

Submitted Nov. 10, 1987
Decided Aug. 24, 1988

Rehearing and Rehearing En Banc
Denied Nov. 4, 1988

Before: FAGG and WOLLMAN, Circuit Judges, and HENLEY, Senior Circuit Judge.

FAGG, Circuit Judge.

The Federal Savings and Loan Insurance Corporation (the FSLIC) brought this action in its own behalf and as conservator for Bohemian Savings and Loan Association

(Bohemian), a federally insured, state-chartered savings and loan association located in St. Louis, Missouri. The FSLIC sought legal and equitable relief for violations of state and federal statutes and regulations, and for breaches of contract and fiduciary duties by, among others, Bohemian's former directors.

The defendant directors moved to dismiss that portion of the complaint against them in which the FSLIC sued in its capacity as conservator for Bohemian. The district court granted the motion based on its determination the court lacked federal subject matter jurisdiction, *see Federal Sav. & Loan Corp. v. Capozzi,* 653 F.Supp. 591, 604 (E.D.Mo.1987), and entered the order as a final judgment under Federal Rule of Civil Procedure 54(b). The FSLIC appeals, and we affirm.

I.

The jurisdictional statute applicable to the FSLIC provides:

> Notwithstanding any other provision of law,
>
> (A) the Corporation [the FSLIC] shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28;
>
> (B) any civil action, suit, or proceeding to which the Corporation [the FSLIC] shall be a party shall be deemed to arise under the laws of the United States * * *; and
>
> (C) the Corporation [the FSLIC] may * * * remove any such action, suit, or proceeding from a State court to the United States district court * * *:
>
> *Provided,* That any action, suit, or proceeding to which the Corporation [the FSLIC] is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and

> which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States.

12 U.S.C. § 1730(k)(1). The FSLIC contends the district court committed error in granting defendants' motion to dismiss because section 1730(k)(1) contains the authority for federal jurisdiction over this case in either of the following two provisions: First, in subsection (A), which the FSLIC argues provides an independent source of agency jurisdiction over suits commenced by federal agencies, *see* 28 U.S.C. § 1345; or second, in subsection (B), which creates broad federal question jurisdiction, *see id.* § 1331. The FSLIC contends subsection (B) is not limited by the clause at the end of section 1730(k)(1) (the proviso) on the theory that the requirements of the proviso are not satisfied here. We disagree with each of these contentions.

II.

Initially, we consider the district court's ruling that agency jurisdiction is not available to the FSLIC under subsection(A) because the FSLIC is only an agency when it sues "in its corporate capacity." *Capozzi,* 653 F.Supp. at 596. We understand the district court's characterization to imply the FSLIC is an agency only when it sues to protect its own interests as an insurer or as a regulatory enforcer.

In reaching this conclusion, the district court based its analysis on the definition of agency contained in 28 U.S.C. § 451. *See id.* Section 451 defines certain governmental entities, including government corporations, as agencies "unless the context shows that such term was intended to be used in a more limited sense." 28 U.S.C. § 451. The district court reasoned that to accord the FSLIC agency jurisidiction when it sues "in its capacity as

conservator" would nullify the other provisions in the statute because the FSLIC would always have access to federal court. *Capozzi,* 653 F.Supp. at 596. The court concluded that "limiting the agency jurisdiction conferred in subsection (A) to actions brought by the FSLIC in its corporate capacity," *id.,* was necessary in order to give meaning to all portions of the statute. *See id.*

Although we reach the same result, we disagree with the court's interpretation of the FSLIC's agency status. Subsection (A) expressly provides the FSLIC is a federal agency. This grant of agency status is not conditional in the sense that the FSLIC is an agency in some contexts but not in others. We view the FSLIC as a federal agency regardless of its capacity in a particular suit. *See, e.g., Federal Sav. & Loan Ins. Corp. v. Dixon,* 835 F.2d 554, 558 (5th Cir.1987) (The "FSLIC, in its corporate form or not, is a governmental agency."); *Federal Sav. & Loan Ins. Corp. v. Ticktin,* 832 F.2d 1438, 1440 (7th Cir.1987) (ordinary meaning of language is clear that the FSLIC is an agency), *petition for cert. filed,* 56 U.S.L.W. 3806 (U.S. May 12, 1988) (No. 87-1865); *Federal Deposit Ins. Corp. v. Sumner Fin. Corp.,* 602 F.2d 670, 679-80 (5th Cir.1979) (statute expressly states the FSLIC is an agency). As we will explain, this view continues to give effect to all parts of the statute. Our rejection of the district court's dichotomy regarding the FSLIC's agency status, however, does not dictate the result the FSLIC urges concerning the independent jurisdictional significance of subsection (A).

III.

We believe section 1730(k)(1) is an authoritative blueprint for federal subject matter jurisdiction in FSLIC cases. As a result, we agree with the Seventh Circuit in *Ticktin* that the FSLIC may not use its subsection (A)

agency status to invoke jurisdiction under 28 U.S.C. § 1345 without regard to the other statutory restrictions contained in the remainder of section 1730(k)(1). *See Ticktin,* 832 F.2d at 1443-44. *But see Federal Sav. & Loan Ins. Corp. v. Israel,* 686 F.Supp. 819, 823-25 (C.D.Cal. 1988); *Federal Sav. & Loan Ins. Corp. v. T.G. Partners II, Ltd.,* 682 F.Supp. 894, 897 (N.D.Tex.1988); *Federal Sav. & Loan Ins. Corp. v. Sajovich,* 642 F.Supp. 74, 75-76 (C.D.Cal.1986). We are convinced that "by including part A in § 1730(k)(1) Congress [did not] intend[ ] to make the jurisdiction limiting proviso inapplicable to cases in which the FSLIC is the plaintiff." *Ticktin,* 832 F.2d at 1443. The FSLIC's contrary suggestion that we give subsection (A) an independent jurisdictional significance is misplaced for several reasons.

First, subsection (A) is not a grant of original jurisdiction to the federal district courts to hear cases in which the FSLIC is a party. This subsection does nothing more than confer federal agency status on the FSLIC. Any doubt about the significance of subsection (A) in this regard is resolved by reference to the legislative history. *See* Financial Institutions Supervisory Act of 1966, S.Rep. No. 1482, 89th Cong., 2d Sess. 12, *reprinted in* 1966 U.S. Code Cong. & Admin. News 3532, 3550. This history is admittedly sparse; nevertheless, it confirms the intent of Congress to clarify the FSLIC's agency status, and it supports the view that section 1730(k)(1) must be read as a comprehensive scheme for jurisdiction over cases involving the FSLIC.

Second, the FSLIC's interpretation of subsection (A)'s significance does not follow from a consideration of section 1730(k)(1) as a whole. We believe " '[t]he plain meaning of the statute decides the issue presented.' " *FERC v. Martin Exploration Mgmt. Co.,* __ U.S. __, 108 S.Ct. 1765, 1768, 100 L.Ed.2d 238 (1988) (quoting *Bethesda*

Hosp. Ass'n v. Bowen, __ U.S. __, 108 S.Ct. 1255. 1258, 99 L.Ed.2d 460 (1988)). In determining the meaning of the statute, it is fundamental that one subsection cannot be read in isolation from the remainder of the whole statute. *See Sutton v. United States,* 819 F.2d 1289, 1292-93 (5th Cir.1987). Contrary to the view that one statutory subsection may "have a life of its own," *Israel,* at 824, we are obligated to "read statutes as a whole," *United States v. Morton,* 467 U.S. 822, 828, 104 S.Ct. 2769, 2773, 81 L.Ed.2d 680 (1984). We also must strive to render all parts of the statute operative. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana,* 472 U.S. 237, 249, 105 S.Ct. 2587, 2594, 86 L.Ed.2d 168 (1985).

When these rules are applied to section 1730(k)(1), 28 U.S.C. § 1345 is not available to the FSLIC as an independent basis of jurisdiction. When read from top to bottom as a unit, section 1730(k)(1) is a straightforward statement that "[n]otwithstanding any other provision of law," the district court is granted original jurisdiction for suits involving the FSLIC under the circumstances described in subsection (B), as narrowed by the proviso. *See Ticktin,* 832 F.2d at 1440, 1442; *Federal Sav. & Loan Ins. Corp. v. Huff,* 631 F.Supp. 1350, 1354-55 (D.Kan.1986), *appeal docketed,* 851 F.2d 316 (10th Cir.1988). This grant unambiguously covers the full range of cases in which the FSLIC is a party, regardless of its nomenclature in any given case, and the statute neither invites nor permits resort to section 1345 agency jurisdiction. In sum, we regard this precisely drawn grant of jurisdiction that is tailored for the FSLIC, rather than the grant of jurisdiction contained in section 1345 for cases brought by federal agencies generally, as controlling the district court's jurisdiction in this case.

The FSLIC contends it may nevertheless resort to section 1345 when it is a plaintiff because it is a federal agen-

cy, to which that section applies. The FSLIC's attempted leap from subsection (A) to section 1345 is sought for one practical reason, of course—to avoid the jurisdictional limitations of the proviso. This approach, however, is flawed because it reads subsection (A) in isolation from the other parts of the statute and attributes to that provision an unwarranted significance independent from the rest of the section in which it appears. It is important to note Congress has not afforded the district courts carte blanche jurisdiction under the terms of section 1345. Instead, agency jurisdiction rests in the district courts unless "otherwise provided by Act of Congress." 28 U.S.C. § 1345.

Through the broad jurisdictional grant in subsection (B) as limited by the proviso, Congress has clearly "otherwise provided" in FSLIC cases, particularly in light of section 1730(k)(1)'s applicability to the FSLIC "[n]otwithstanding any other provision of law." Thus, the FSLIC may not look beyond that statute's provisions and into section 1345 for the purpose of determining the district court's jurisdiction in this case. *See Ticktin,* 832 F.2d at 1443-44. To hold otherwise would circumvent congressional intent as expressed in subsection (B) and the proviso—that intent plainly being to confine the FSLIC's lawsuits in federal court to those cases in which the issues arise under federal law. Furthermore, our approach is compatible with the jurisdictional scope of the Federal Deposit Insurance Corporation (the FDIC), which operates according to a largely parallel statute. *See id.* at 1442-43.

Finally, contrary to the view that the *Ticktin* analysis effectively reads subsection (A) out of the statute, *see, e.g., Israel,* 686 F.Supp. at 824-25; *T.G. Partners II, Ltd.,* 682 F.Supp. at 897; *Sajovich,* 642 F.Supp. at 76, the converse actually is true. If we were to permit the FSLIC access to section 1345 agency jurisdiction by reading the statute in a

way that divorces subsection (A) from subsection (B) and the proviso, we would have clearly failed to read all parts of section 1730(k)(1) together as we must. *See Mountain States Tel. & Tel. Co.*, 472 U.S. at 249, 104 S.Ct. at 2594 (statute should not be interpreted to render one part inoperative).

Reading subsection (A) in isolation would result in the essential substantive content of subsection (B) and the proviso being lost in cases in which the FSLIC is a plaintiff. This loss would occur even though subsection (B) by its terms encompasses all cases in which this agency is a party and even though the proviso imposes " 'an absolute limitation on federal jurisdiction over cases to which [the FSLIC] is a party.' " *Ticktin*, 832 F.2d at 1443 (quoted citation omitted). To ignore a statutory provision that imposes a specific limitation on jurisdiction over FSLIC cases would be "an entirely unacceptable method of construing [the] statute[ ]." *Natural Resources Defense Council, Inc. v. United States Envtl. Protection Agency*, 822 F.2d 104, 113 (D.C.Cir.1987).

We conclude the jurisdictional grant established in section 1730(k)(1) does not carry with it the opportunity for the FSLIC to use subsection (A) as a springboard to 28 U.S.C. § 1345 jurisdiction. For this reason, we must go on to consider the correctness of the district court's ruling on the availability of jurisdiction under subsection (B) and the proviso.

IV.

The district court held subsection (B) provides subject matter jurisdiction to the FSLIC unless the conditions in the proviso apply. *Capozzi*, 653 F.Supp. at 596-97. Finding all of the proviso conditions satisfied, *id.* at 596-601, the district court concluded the FSLIC could not invoke

subject matter jurisdiction under subsection (B). We agree with this conclusion.

Subsection (B) grants federal jurisdiction over cases in which the FSLIC is a party unless those cases fall within the terms of the proviso. *See Ticktin,* 832 F.2d at 1443. The proviso operates to exclude FSLIC cases from federal court when: (1) the FSLIC is a party to the action in its capacity as legal custodian of a state-chartered institution; (2) the action involves only the rights or obligations of investors, creditors, stockholders, and the insured institution; and (3) the rights or liabilities are determined under state law.

The parties do not dispute that in the portions of the complaint relevant to this appeal, the FSLIC is suing as Bohemian's conservator and "does not assert any of its rights as a governmental agency." *Capozzi,* 653 F.Supp. at 598. The FSLIC claims, however, the second and third proviso requirements are not satisfied in this case. Thus, the FSLIC argues the proviso is rendered inapplicable, conferring federal jurisdiction.

With regard to the second requirement, the FSLIC argues its complaint involves rights or obligations of persons other than those parties described in the proviso. This argument is based on the circumstance that directors of an insured institution are not included in the list of proviso parties, and Bohemian's former directors are named as defendants in this action. The *Ticktin* court in response to an identical argument held:

> If, as in this case, the receiver, who represents the institution, brings suit to enforce the rights of the institution and the resolution of those rights is the only question in the suit, then the suit "involves only the rights or obligations of . . . such institution," regardless of who the defendants are.

Ticktin, 832 F.2d at 1444; *see Federal Sav. & Loan Ins. Corp. v. Frumenti Dev. Corp.,* 676 F.Supp. 957, 960-62 (N.D.Cal.1988) (in context of removal under 12 U.S.C. § 1730(k)(1)(C)). *But see Sajovich,* 642 F.Supp. at 77. *Compare Fidelity Fin. Corp. v. Federal Sav. & Loan Ins. Corp.,* 834 F.2d 741, 744-45 (9th Cir.1987) (the FSLIC defending itself against suit by failed institution). Based on the reasoning in *Ticktin,* we agree the second proviso requirement is met.

The FSLIC also argues the proviso's third requirement is not satisfied because the case involves questions of federal law. The FSLIC asserts the director defendants violated a number of federal regulations governing the management and operation of federally insured thrift institutions and, therefore, that this case is not "under State law," 12 U.S.C. § 1730(k)(1). *See North Miss. Sav. & Loan Ass'n v. Hudspeth,* 756 F.2d 1096, 1100 (5th Cir.1985), *cert. denied,* 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986); *Sajovich,* 642 F.Supp. at 77. Based on this argument, the FSLIC takes the position the proviso is not triggered due to lack of compliance with what the FSLIC deems to be a state law only requirement. We disagree.

The circuit court in *Ticktin* concluded in response to a similar argument that the presence of federal regulations in this type of case did not defeat the state law requirement of the proviso. The court stated:

> It is important to note that the proviso by its terms applies to a suit "which involves only the rights or obligations . . . under State law," not just to a suit "that involves only State law." The proviso is thus not limited to suits that do not involve federal law. The determination of the rights and obligations under state law of investors, creditors, stockholders, and the

> savings and loan in this heavily federally regulated area of the law could never be done without an eye on the relevant federal law. Every suit with the FSLIC as a party necessarily involves federal law.
>
> * * * * *
>
> * * * [A]ll the alleged violations of federal law are subsidiary questions to the ultimate question in the case: whether the directors, under state law, breached their fiduciary duties * * *. The resolution of that issue would be the resolution of the case. Thus, this is a suit that "involves only the rights or obligations of investors, creditors, stockholders, and such institutions under State law."

Ticktin, 832 F.2d at 1445-46; *see also Frumenti Dev. Corp.,* 676 F.Supp. at 962-64. This reasoning is equally persuasive here.

The district court determined that despite "the allusion by [the FSLIC] to duties imposed on the [director] defendants by federal regulations" the counts relevant to this appeal "are state law breach of fiduciary duty and breach of contract actions." *Capozzi,* 653 F.Supp. at 601-02. We agree with the district court that the claims pursued by the FSLIC on Bohemian's behalf against the director defendants have their origin in state. Accordingly, we conclude those claims are "under state law," within the meaning of the proviso. *Cf. Franchise Tax Bd. v. Construction Laborers Vacation Trust,* 463 U.S. 1, 8-9, 103 S.Ct. 2841, 2845-46, 77 L.Ed.2d 420 (1983) (" 'A suit arises under the law that creates the cause of action.' ") (quoting *American Well Works Co. v. Layne & Bowler Co.,* 241 U.S. 257, 260, 36 S.Ct. 585, 586, 60 L.Ed. 987 (1916) (Holmes, J.)). This conclusion leads us also to agree with the district court that each of the proviso requirements is satisfied in this case.

V.

To avoid the jurisdictional limitations of the proviso, the FSLIC makes an additional jurisdictional argument apparently not presented to the court in *Ticktin*. *See Ticktin*, 832 F.2d at 1445. The FSLIC claims there is federal jurisdiction because Bohemian, and therefore the FSLIC as Bohemian's conservator, "has a federal cause of action for damages caused by violation of federal regulations" by Bohemian's directors. In making this argument, the FSLIC acknowledges it is suing not in its own right as a federal agency to enforce regulations within its field of responsibility, but in its capacity as conservator for Bohemian. *Compare Federal Sav. & Loan Ins. Corp. v. Kearney Trust Co.*, 151 F.2d 720, 721-25 (8th Cir.1945) (the FSLIC suing on its own behalf as assignee of claims to recover funds misapplied by president of federally chartered savings and loan).

The FSLIC does not claim either the regulations involved or the statutes under which they are promulgated expressly provide a remedy to a federally insured thrift institution for regulatory violations by its directors. Even so, the FSLIC contends federal jurisdiction exists independent of Bohemian's state law action because Bohemian has either an implied private cause of action or a federal common law cause of action to sue the director defendants for their violation of federal regulations. We disagree.

Whether the regulations relied on by the FSLIC imply a private cause of action is a question that is analyzed according to the Supreme Court principles in *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975). *See also Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76, 99 S.Ct. 2479, 2488-89, 61 L.Ed.2d 82 (1979); *Redd v. Federal Land Bank*, 851 F.2d 219, 221 (8th Cir.1988). The district court undertook this analysis and

held no cause of action is implied in favor of Bohemian. *Capozzi,* 653 F.Supp. at 599-601.

We have considered the *Cort* factors, and we likewise discern no congressional intent that the broad-based regulatory protections involved here grant a federal cause of action for damages to a federally insured, state-chartered thrift institution against its former directors. In the context of this type of institution, we believe these regulations are "forward-looking, not retrospective; [they] seek[ ] to forestall insolvency, not to provide recompense after it has occurred. In short, there is no basis in the language of [the regulations or promulgating statutes] for inferring that a civil cause of action for damages lay in favor of anyone." *Touche Ross & Co.,* 442 U.S. at 570-71, 99 S.Ct. at 2486-87.

The FSLIC also argues we should recognize a federal common law cause of action for the regulatory violations it asserts. *See Sajovich,* 642 F.Supp. at 77; *First Haw. Bank v. Alexander,* 558 F.Supp. 1128, 1131-32 (D.Haw. 1983); *City Fed. Sav. & Loan Ass'n v. Crowley,* 393 F.Supp. 644, 650-51 (E.D.Wis.1975). Federal courts have the authority to formulate federal common law, however, only in a "few and restricted" instances. *Wheeldin v. Wheeler,* 373 U.S. 647, 651, 83 S.Ct. 1441, 1445, 10 L.Ed.2d 605 (1963). The instances in which the Supreme Court has approved this development "fall into essentially two categories: those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' and those in which Congress has given the courts the power to develop substantive law." *Texas Indus., Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 640, 101 S.Ct. 2061, 2067, 68 L.Ed.2d 500 (1981) (quoted citation omitted).

In determining whether federal or state law should govern private litigation by a state-chartered thrift institution against its directors, we are guided by the principle

that for federal common law to come into play, there must exist "a significant conflict between some federal policy or interest and the use of state law." *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68, 86 S.Ct. 1301, 1304, 16 L.Ed.2d 369 (1966); *see also Miree v. DeKalb County*, 433 U.S. 25, 29-33, 97 S.Ct. 2490, 2493-96, 53 L.Ed.2d 557 (1977); *In re "Agent Orange" Prod. Liability Litigation*, 635 F.2d 987, 993 (2d Cir.1980), *cert. denied*, 454 U.S. 1128, 102 S.Ct. 980, 71 L.Ed.2d 116 (1981). In the absence of a significant threat to any identifiable federal policy or interest, *see Wallis*, 384 U.S. at 68, 86 S.Ct. at 1304, "there is no federal interest in uniformity for its own sake," *In re "Agent Orange" Prod. Liability Litigation*, 635 F.2d at 993.

The FSLIC argues, however, that development of a federal common law cause of action is called for because a uniform federal rule is needed "to preserve the soundness of the thrift industry and the integrity of the federal depository insurance fund." The use of state law principles to determine director liability, however, does not pose a threat to the integrity of the savings and loan industry and the insurance fund. The crux of Bohemian's claims is whether its directors breached agreements with or fiduciary duties to Bohemian. In these circumstances an interplay certainly exists between federal regulations in the savings and loan industry and the director defendants' liability. Ultimately, however, no substantive rights or duties of the federal government hinge on the outcome of this appeal, *Miree*, 433 U.S. at 31, 97 S.Ct. at 2495; *In re "Agent Orange" Prod. Liability Litigation*, 635 F.2d at 993, and the effect of these regulations on the directors' liability depends on application of substantive principles of state law. The FSLIC's argument in favor of federal law ignores that the regulations are "forward-looking, not retrospective; [and] seek[ ] to forestall insolvency, not to

provide recompense after [insolvency] has occurred." *Touche Ross & Co.*, 442 U.S. at 570-71, 99 S.Ct. at 2486-87.

In our view, no unique federal concern exists here because "the alleged violations of federal law are subsidiary questions to the ultimate question in the case: whether the directors, under state law, breached their fiduciary duties" to and agreements with Bohemian. *Ticktin*, 832 F.2d at 1446. There is no conflict between any identifiable federal interest or policy and the application of state law to resolve the liability of Bohemian's directors that warrants creation of a federal common law cause of action. Thus, in these circumstances, the uniformity sought by the FSLIC is insufficient reason to invoke the federal common law.

We therefore conclude neither the regulations claimed to be violated nor their promulgating statutes provide the basis for an implied private or a federal common law cause of action for Bohemian.

VI.

In sum, we hold subsection (A) of section 1730(k)(1) does not provide an independent basis for federal jurisdiction. We also hold each of the conditions of the proviso is satisfied in this case, thus preventing the counts in this appeal from being deemed to arise under federal law within the meaning of subsection (B). We also hold Bohemian, and the FSLIC as its conservator, have neither an implied private nor a federal common law cause of action against the director defendants based on the implication of federal regulations relevant to the directors' fiduciary duties to Bohemian under state law. Accordingly, we affirm the district court's grant of defendants' motion to dismiss for lack of federal subject matter jurisdiction.

Finally, we remind counsel that unpublished opinions are not authoritative precedent in this court, *see* 8th Cir.R. 8(i), and their citation violates the rule. *United States v. McDaniel,* 844 F.2d 535, 537 (8th Cir.1988).

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. MISSOURI

No. 86-233C(5)

FEDERAL SAVINGS AND LOAN CORPORATION, PLAINTIFF

v.

JOHN V. CAPOZZI, ET AL., DEFENDANTS

Jan. 23, 1987

MEMORANDUM

LIMBAUGH, District Judge.

Plaintiff Federal Savings and Loan Insurance Corporation (FSLIC) brings this twenty-four count action in its corporate capacity and as conservator of Bohemian Savings and Loan Association, a St. Louis, Missouri thrift institution. It seeks legal and equitable relief against a number of persons formerly associated with Bohemian. Plaintiff originally filed this suit on January 30, 1986, immediately after the Federal Home Loan Bank Board appointed it conservator of the thrift pursuant to 12 U.S.C. § 1729(c)(1). The FSLIC then filed an amended complaint on February 28, 1986. Defendants Cline, Fechner and Bommarito, former directors of Bohemian, contend that the Court does not have subject matter over Counts I-XVI of the amended complaint. Since these defendants raise

jurisdictional issues which apply equally to the FSLIC's actions against some of the other defendants, the Court will consider these issues as they apply to the entire complaint. *See* Fed.R.Civ.P. 12(h)(3).

I. Analysis of the Statute

This analysis must necessarily focus on 12 U.S.C. § 1730(k)(1), which reads:

> Notwithstanding any other provision of law, (A) the Corporation shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28, (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect; Provided, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States.

Plaintiff claims that both subsections (A) (agency jurisdiction) and (B) (federal question jurisdiction) provide for jurisdiction in this court. Additionally, plaintiff asserts that the limiting proviso in the statute ("*Provided* . . .")

has no applicability to the amended complaint and, therefore, does not limit its ability to prosecute the action in this jurisdiction. The defendants claim that the FSLIC cannot invoke the "agency" jurisdiction of subsection (A) and that the proviso applies to the allegations in Counts I-XVI and precludes jurisdiction under subsection (B).

This jurisdictional statute, 12 U.S.C. § 1730(k)(1), is part of the Financial Institutions Supervisory Act of 1966, Pub.L. 89-695, *codified at* 12 U.S.C. §§ 1461, *et seq.* The legislative history of this jurisdictional provision adds little to its express language. *See* S.Rep. No. 1482, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.Code Cong. & Admin. News 3532, 3550.[1] The Senate Report does note, though, that the jurisdictional provision now codified at 12 U.S.C. § 1730(k)(1) differs from the statute that provides for

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[1] "Subsection (k). Jurisdiction and enforcement.—(1) This subsection would (A) make clear that the Corporation is an agency of the United States for purposes of title 28 of the United States Code, (B) provide that any action to which the Corporation shall be a party shall be deemed to arise under the laws of the United States and that the United States district courts shall have original jurisdiction of such actions, without regard to the amount in controversy, and (C) authorize the removal to a Federal court of any such action commenced in a State court. However, actions to which the Corporation is a party in its capacity as receiver for a State-chartered institution and which involve only the rights or obligations of investors, creditors, stockholders, and such institution under State law would not be deemed to arise under the laws of the United States. Moreover, no attachment or execution could issue against the corporation or its property before final judgment in any action in any court."

"The provisions of subsection (k)(1), with the exception of clause (A) therefore, are similar to existing law applicable to Federal Reserve banks (12 U.S.C. 632), and to the Federal Deposit Insurance Corporation (12 U.S.C. 1819)."

(2) Subsection (k)(2), which provides for enforcement of Corporation orders by the United States district courts, corresponds with paragraph (8) of the proposed amended section 5(d).

jurisdiction of actions brought by the Federal Deposit Insurance Corporation, 12 U.S.C. § 1819. *Id.*

A. Subsection (A), Agency Jurisdiction.

This section of the statute provides that "the Corporation shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28." This reference is important because 28 U.S.C. § 1345 provides that "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or other proceedings commenced by the United States, or by [any] agency or officer thereof expressly authorized to sue by Act of Congress." Since Congress has authorized the FSLIC to sue and be sued, 12 U.S.C. § 1725(c) (4), plaintiff contends that 12 U.S.C. § 1730(k)(1)(A) and 28 U.S.C. § 1345 provide for federal jurisdiction of any suit brought by the FSLIC. Under the interpretation urged by plaintiff, the FSLIC can file suit under subsection (A) for subrogation and breach of contract in its corporate capacity as well as asserting the rights of Bohemian in its capacity as conservator. The Seventh Circuit has essentially adopted this position. *FSLIC v. Krueger,* 435 F.2d 633, 635-36 (7th Cir.1970); *Katin v. Apollo Savings,* 460 F.2d 422, 424 (7th Cir.1971), *cert. denied,* 406 U.S. 918 (1982); *see also Gibraltar Building and Loan v. State Savings and Loan Ass'n.,* 607 F.Supp. 722, 732 n. 2 (N.D.Cal.1985) ("The Court rejects plaintiff's argument that 'Corporation' as defined within § 1730(k)(1) does not include FSLIC when it is acting as a receiver, but instead applies only to the agency in its individual capacity as insurer.") In addition, plaintiff argues that the proviso has no applicability to subsection (A) but, instead, limits only the jurisdiction conferred by subsection (B), the provision establishing federal question jurisdiction.

In their motions to dismiss, defendants challenge the Court's jurisdiction over Counts I-XVI, which plaintiff brings in its capacity as conservator of Bohemian. The defendants assert that, for purposes of the "agency" jurisdiction conferred by 12 U.S.C. § 1730(k)(1)(A), the Court must distinguish between those counts brought by the FSLIC in its corporate capacity from those brought in its capacity as conservator of Bohemian. In particular, they contend that the FSLIC is not acting as an agency for purposes of § 1730(k)(1)(A) and 28 U.S.C. § 1345 when it brings suit in its capacity as a conservator. As a consequence, they argue, subsection (A) does not provide for subject matter jurisdiction over Counts I-XVI.

Since plaintiff claims the proviso does not limit the grant of jurisdiction in subsection (A),[2] if its construction of that provision is correct, the FSLIC can always bring suit in federal court, regardless of its capacity. However, a

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[2] In this Memorandum, the Court relies extensively on the excellent opinion by U.S. District Judge Dale Saffels in *FSLIC v. Huff*, 631 F.Supp. 1350 (D.Kan.1986). However, while concurring with most of Judge Saffels' opinion, the Court does not agree with his conclusion that the proviso limits the grant of jurisdiction in subsection (A) of 12 U.S.C. § 1730(k)(1). *See id.* at 1355-56. The proviso, by its explicit language, limits the situations in which actions by the FSLIC "shall . . . be deemed to arise under the laws of the United States." This language is identical to that in subsection (B) of § 1730(k)(1), the federal question provision and, consequently, the proviso limits only that subsection.

Even though the proviso does not limit the grant of jurisdiction in § 1730(k)(1)(A), it does not necessarily follow the FSLIC can always invoke agency jurisdiction. As explained in this Memorandum, the FSLIC can bring suit under subsection (A) only when it sues in its corporate capacity since only in those circumstances does it act as an agency. The Court agrees, then, with Judge Saffel's conclusion that the FSLIC cannot always bring suit under 12 U.S.C. § 1730(k)(1)(A), and merely disagrees with the basis for this conclusion.

Court must always construe a statute so that all of its parts are meaningful. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana,* 472 U.S. 237, 105 S.Ct. 2587, 2595, 86 L.Ed.2d 168 (1985); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1978); *Colautti v. Frankin,* 439 U.S. 379, 392, 99 S.Ct. 675, 684, 58 L.Ed.2d 596 (1979). Under the construction of subsection (A) urged by plaintiff, subsections (B) and (C) would have no relevance. In any law suit, the FSLIC could simply invoke the authority of subsection (A) and proceed to suit. The Court, then, will decline to follow the approach advocated by the Seventh Circuit in *Krueger,* 435 F.2d at 635-36; and *Katin,* 460 F.2d at 424, and will, instead, construe subsection (A) in a manner that does not render the remaining portions of § 1730(k)(1) irrelevant.

The language of the pertinent statutes provides a basis for a more reasonable construction. While subsection (A) of § 1730(k)(1) states that "the Corporation shall be deemed to be an agency of the United States" within 28 U.S.C. § 451, the referenced provision contains language which suggests that the definition of agency, and the significance of that status, varies with the statutory context. In particular, § 451 states that certain governmental entities are agencies "unless the context shows that such term was intended to be used in a more limited sense." This language suggests that, in some circumstances, an "agency" might not have that status for jurisdictional purposes.

The relevant jurisdictional statute, 12 U.S.C. § 1730(k)(1), in subsection (A) refers to the flexible definition of agency in 28 U.S.C. § 451. By limiting the agency jurisdiction conferred in subsection (A) to actions brought by the FSLIC in its corporate capacity, the Court can accommodate both the rule of construction which requires that all portions of a statute must have some meaning with the

language in the statute that "the Corporation shall be deemed to be an agency." As a consequence, the Court holds that only those counts brought by the FSLIC in its corporate capacity fall within the agency jurisdiction authorized in 12 U.S.C. § 1730(k)(1)(A). Concomitantly, jurisdiction of any count brought by plaintiff in its capacity as conservator must arise from subsection (B) of § 1730 (k)(1),[3] or some other jurisdictional statute. This is a much more reasonable construction of subsection (A) than that urged by the plaintiff.

B. Subsection (B), Federal Question Jurisdiction.

This portion of § 1730(k)(1) provides, in part, that "any civil action . . . to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof." Viewed alone, this subsection provides subject matter jurisdiction in federal court for plaintiff's entire complaint. However, the proviso, which specifically limits when suits brought by the FSLIC "arise under the laws of the United States" applies directly to and restricts the grant of jurisdiction in subsection (B). As a consequence, if Counts I-XVI fall within the scope of the proviso, they do not "arise under the laws of the United States," and, consequently, subsection (B) does not authorize subject matter jurisdiction.

Whether this limitation applies to Counts I-XVI of the amended complaint requires careful scrutiny of the proviso, which reads

[3] In Counts I-XVI, plaintiff asserts the rights of Bohemian in its capacity as conservator of the institution. Crucially, plaintiff does not allege that Bohemian assigned its rights against the defendants to the FSLIC as a corporate entity. In that event, plaintiff could make a plausible argument for asserting the rights of Bohemian while invoking the agency jurisdiction of 12 U.S.C. § 1730(k)(1)(A).

> *Provided,* That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States.

The defendants only challenge the Court's subject matter jurisdiction over the counts brought by the FSLIC in its capacity as conservator of Bohemian. In addition, plaintiff concedes that Bohemian is an insured State-chartered institution. The Court need only consider, then, whether the action "involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law" in determining whether the proviso applies.

1. "Only the Rights or Obligations of Investors, Creditors, Stockholders and Such Institution."

The FSLIC claims the proviso does not apply to Counts I-XVI of the complaint since they involve the rights or obligations of classes of persons outside those delineated in the proviso. In support of this position, plaintiff cites *FSLIC v. Forde,* No. 85-774, slip op. (C.D.Cal. July 3, 1985). There, a district court considered whether a director's and officer's liability suit involved only the rights of persons and entities listed in the proviso. In holding that the suit involved the rights and obligations of other types of persons and, therefore, fell outside the scope of the proviso, the district court noted,

> If the action involves the rights or obligations of any third party, even though the rights or obligations of investors, creditors, stockholders and the institution

> are also involved, the proviso, by its express terms, is inapplicable and federal jurisdiction exists. Here, admittedly, the rights and obligations of investors, creditors, and stockholders of San Marino, as well as the institution itself are involved. However, those are not the only rights and obligations involved. This action also involves the obligations of certain officers and directors of San Marino, certain borrowers of San Marino, and an appraiser who prepared appraisals utilized by San Marino.

Id. at 5. Plaintiff also cites *FSLIC v. Sajovich,* 642 F.Supp. 74 (C.D.Cal.1986), where the same district court took a similar approach in finding that an action involved the rights of third parties and, correspondingly, that the proviso did not apply. *Id.* at 77.

The Kansas district court in *FSLIC v. Huff,* 631 F.Supp. 1350 (D.Kan.1986), approached this issue from a different angle. After discussing the authority the FSLIC cites here, the district court construed the pertinent language as "direct[ing] attention to the FSLIC's role in bringing such action and what rights or obligations it seeks to protect or enforce." *Id.* at 1354. The *Huff* court then held that the FSLIC in its suit there was, in effect, merely asserting the rights of the insolvent thrift institution through its authority as receiver and, correspondingly, the rights of others who had an interest in any recoupment of money for the institution, namely its creditors, investors and stockholders. *Id.* The Kansas district court, in effect, distinguished between actions in which the FSLIC seeks to recover for an injury to itself as a corporation, for example a subrogation action for recovery of insurance proceeds paid in an insolvency, from those suits in which the agency steps into the shoes of an institution and asserts its rights. In the first type of case, the FSLIC asserts only its

rights. Consequently, the proviso does not apply and a federal district court has jurisdiction over the action. However, when the FSLIC asserts only the rights of the institution in an attempt to recoup that entity's assets, the proviso precludes the conservator from asserting federal jurisdiction under subsection (B). Any reference to the status of a defendant has no relevance in this approach other than, perhaps, as an indicator of the FSLIC's role in bringing suit, *i.e.*, whether it asserts its rights or the institution's.

The Court finds the distinction drawn by the district court in *Huff* preferable to the approach advocated by the plaintiff. In Counts I-XVI, the FSLIC seeks to recoup money which rightly belongs to Bohemian, and these actions, if successful, will benefit the institution and, indirectly its creditors, shareholders, and investors. For purposes of the proviso, then, these counts "involve only the rights of investors, creditors, stockholders and such institution." The FSLIC does not assert any of its rights as a governmental agency.

2. "Under State Law."

The FSLIC argues that the proviso does not apply to Counts I-XVI because these actions depend, at least in part, on duties and obligations imposed by federal law. Specifically, plaintiff alleges that the director defendants violated their duties under 12 C.F.R. § 563.9-3(b) (lending limits), 12 C.F.R. § 563.9-8 (investments), 12 C.F.R. § 563.17(a) (safe and sound management policies), 12 C.F.R. § 563.17-1(c)(1) (loan requirements), 12 C.F.R. § 563.43(b) (loans to affiliated persons), 12 C.F.R. § 523.12(a) and (b) (statutory reserves and net worth), 12 C.F.R. § 523.11 (liquidity), 12 C.F.R. § 563.17-1(c) (accounting and records), 12 C.F.R. 563.37 (operation of

service corporation), 12 C.F.R. § 563.39 (unsafe and unsound employment contracts), and 12 C.F.R. § 563.41(b)(c)(iii) (purchasing property from affiliated persons). In support of its contention that its allusions to these regulations in Counts I-XVI take these actions outside the operation of the proviso, plaintiff cites *FSLIC v. Forde,* at 5; *FSLIC v. Elliott,* No. 83-1803, slip op at 10 (N.D.Ill. March 8, 1985) [Available on WESTLAW, DCTU database]; and *FSLIC v. Ticktin,* No. 83-2996, slip op. at 6 (N.D.Ill. November 28, 1983).

The FSLIC also notes that the operative word in the proviso is "involves." By contrast, 28 U.S.C. § 1331 federal question jurisdiction attaches when an action "arises under" federal law. *See* 28 U.S.C. § 1331, and C. Wright, *Law of Federal Court* § 17 at p. 91 (4th ed. 1983). Plaintiff argues that the required nexus between federal law and the allegations in a complaint for purposes of the proviso ("involves") is slight in relation to that required for federal question jurisdiction under § 1331 ("arises under").

However, in making this argument the FSLIC ignores the structure of 12 U.S.C. § 1730(k)(1) and, in particular, the relation of the proviso to subsection (B). The proviso specifically limits the situations in which actions brought by the FSLIC "shall be deemed to arise under the laws of the United States" and subsection (B) provides for precisely this type of jurisdiction. Since the proviso in 12 U.S.C. § 1730(k)(1) explicitly limits the grant of jurisdiction in subsection (B), which copies the language of 28 U.S.C. § 1331, the general federal question statute, whether an action "involves" federal law for purposes of the proviso should not require an analysis of factors fundamentally different from that appropriate to § 1331.

The regulations plaintiff cites and their authorizing statutes, the Federal Home Owners Loan Act (HOLA), 12

U.S.C. § 1461 *et seq.*, do not provide an express right of action by an aggrieved savings and loan against persons who allegedly violated these provisions. As a result, the Court must determine whether the cited regulations provide an implied right of action.[4] In the first important case in this area, *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1974), the Supreme Court noted that a Court should examine four factors when determining whether federal law implies a right of action.

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"—that is does the statute create a federal right in favor of plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78, 95 S.Ct. at 2088 (citations omitted). However, in *Touche Ross & Co. v. Redington,* 442 U.S. 560, 99 S.Ct.

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[4] The Court appreciates the distinction between a contention under Fed.R.Civ.P. 12(b)(6) that a complaint fails to state a claim and a challenge to subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1). However, a federal court has federal question jurisdiction over a complaint only if it concerns a "substantial federal question." *Hagans v. Lavine,* 415 U.S. 528, 536-37, 94 S.Ct. 1372, 1378-79, 39 L.Ed.2d 577 (1974). Since the Supreme Court has greatly restricted the situations in which federal district courts can imply rights of action under federal law, the court must determine whether plaintiff's citations to federal regulations raise a substantial federal question. This analysis focuses largely on Congressional intent.

2479, 61 L.Ed.2d 82 (1978), the Supreme Court explained its decision in *Cort v. Ash,* noting,

> It is true that in *Cort v. Ash,* the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one . . . But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.

Id. at 575, 99 S.Ct. at 2488. The Court also noted that its focus on Congressional intent was "stricter" than the approach previously authorized. *Id.* at 578, 998 S.Ct. at 2490.

The Supreme Court in *Transamerica Mortgage Advisors v. Lewis,* 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979), applied the doctrine of *Touche Ross* to an action brought under § 206 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1.[5] The Court, in determining whether Congress intended to imply a private right of action under § 206, noted that the statute "simply proscribes certain conduct, and does not, by its terms, create or alter any civil liabilities." *Id.* at 19, 100 S.Ct. at 246. The regulations plaintiff cites are similarly proscriptive. The Supreme Court also considered the enforcement provisions Congress included in the statute, stating

> [I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading

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[5] The Supreme Court determined that Congress intended to imply a right of action under § 215 of the Act. *See id.* at 18-19, 100 S.Ct. at 246. But, for purposes of this analysis, the Supreme Court's decision that Congress did not imply a right of action under § 206 of the Act has more relevance.

> others into it. "Where a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." . . . In view of these express provisions for enforcing the duties imposed by § 206, it is highly improbable that "Congress absentmindedly forgot to mention an intended private action."

Id. at 20, 100 S.Ct. at 247. This Court, then, in deciding whether the regulations cited by the FSLIC support an implied private right of action, should carefully scrutinize the enforcement provisions provided by Congress in the Home Owners Loan Act.

Several courts have taken precisely this approach. In *First Hawaiian Bank v. Alexander,* 558 F.Supp. 1128 (D.Hawaii 1983), the federal district court refused to imply a private right of action for violation of regulations authorized by the Home Owners Loan Act. *Id.* at 1131. The court in *First Hawaiian* based its decision on the remedies the FSLIC could invoke in its corporate capacity. *See* 12 U.S.C. § 1730.[6] In particular, the district court noted,

> In 1966, Congress reviewed the remedies available to the FHLBB to enforce the HOLA and its regulations. At the time, there was no case law establishing a private right of action. Congress, in expanding the FHLBB's enforcement powers, explicitly noted that the only enforcement action authorized was the extreme remedy of receivership. No mention was made of a private right of action, and Congress did not provide for a private cause of action at that time.

Id. Other courts have reached similar conclusions about the non-existence of an implied right of action under the

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[6] These remedies include the rights to issue cease-and-desist orders, 12 U.S.C. § 1730(e) and (f), and to suspend or remove directors and officers, 12 U.S.C. § 1730(g).

Home Owners Loan Act. *Home Federal Savings and Loan v. Merrill Lynch,* 525 F.Supp. 393, 396-97 (N.D.Ala. 1981); and *Ameriwest Financial Corp. v. Sowell,* No. 85-1277, slip op. at 3 (D.N.M. October 4, 1985) [Available on WESTLAW, DCTU database].

The FSLIC might argue that 12 U.S.C. § 1730(k)(1), the statute on which it seeks to ground subject matter jurisdiction, is part of the same statute which authorizes the remedies the FSLIC and FHLBB can employ to enforce their regulations. The presence of the jurisdictional provision in this statute might suggest that the FSLIC can bring suits from damages caused by these violations. However, the defendants in their motion to dismiss question the court's subject matter jurisdiction over the counts brought by the FSLIC in its capacity as conservator of Bohemian. By definition, in these counts the FSLIC can assert only the rights of Bohemian[7] and, consequently, the Court must determine whether the institution could bring suit under the cited federal regulations. The Court does not consider whether the FSLIC could bring an action under the agency jurisdiction conferred by subsection (A) of 12 U.S.C. § 1730(k)(1) for damages it suffered as a corporate entity due to the alleged violations by the defendants of the cited regulations.

While the Court's primary bases for refusing to recognize that the FSLIC as conservator of Bohemian has a private right of action under the regulations are these provisions' content and the existence of the extensive enforcement provisions, the other factors delineated in *Cort v. Ash* – which still have some importance even after *Touche Ross* – do not under-cut the Court's analysis. The FSLIC, as conservator of Bohemian, can reasonably argue that the first factor, "[I]s the plaintiff 'one of the class' for whose

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[7] *See* 12 C.F.R. § 547.7.

especial benefit the statute was enacted?", *Cort v. Ash,* 422 U.S. at 78, 95 S.Ct. at 2087, *quoting, Texas and Pacific R. Co. v. Rigsby,* 241 U.S. 33, 39, 36 S.Ct. 482, 484, 60 L.Ed. 874 (1916), might support a private right of action in favor of the aggrieved thrift. Congress certainly meant to protect savings and loan institutions by authorizing the cited regulations. It is just as likely, though, that Congress intended to protect the public at large. The legislative history of the enforcement provisions supports both interpretations,[8] so the Court cannot say with certainty that Congress authorized the Home Loan Bank Board to issue regulations for the "*especial*" benefit of the thrift institutions.

Further, the fourth factor listed by the Supreme Court in *Cort v. Ash,* "[I]s the cause of action one traditionally relegated to state law, in an area basically the concern of the States?", 422 U.S. at 78, 95 S.Ct. at 2087, *citing Wheeldin v. Wheeler,* 373 U.S. 647, 652, 83 S.Ct. 1441, 1445, 10 L.Ed.2d 605 (1963), might suggest an answer in the negative. In that event, the FSLIC could argue that the Court should imply a right of action. The HOLA statutes certainly provide that the Federal Home Loan Bank Board and the FSLIC should play an important role in regulating state-chartered savings and loan institutions. The FSLIC might argue, then, that the overriding federal concerns relating to the maintenance of financially sound thrift institutions support the implication of a private right of action. However, since HOLA provides for both federal and

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[8] "[Congress granted the FSLIC] these powers [to take remedial action] . . . to prevent violations of law or regulation . . . which might otherwise adversely affect the Nation's financial institutions, with resulting harmful consequences to the growth and development of the Nation's economy." S.Rep. No. 1482, *reprinted in,* 1966 U.S.Code Cong. and Admin.News at 3533 (bracketed comment added).

state regulation of state-chartered savings and loans,[9] the Court cannot say that the federal interests are so strong that they outweigh its view that Congress did not intend to provide for a private right of action.

The FSLIC contends that even if it has no private right of action in its capacity as conservator, the defendants owed duties to plaintiff under federal common law and, consequently, Counts I-XVI involve issues of federal law. The district court in *First Hawaiian Bank v. Alexander,* while refusing to imply a right of action, allowed the plaintiff there to sue under federal common law. 558 F.Supp. at 1131-32. In reaching this result, the district court relied heavily on the decision of the Seventh Circuit in *Barany v. Buller,* 670 F.2d 726 (7th Cir.1982). Specifically, the district court noted that,

> This court, following the lead of the Seventh Circuit, finds that the federal interest in uniform regulation of savings and loan associations supports recognition of a federal common law cause of action for breach of fiduciary duty. The court further finds that HOLA's remedial scheme does not provide the kind of remedy requested by the plaintiff. Indeed, the claim for breach of fiduciary duty is separate and distinct from the claim arising out of the violation of HOLA. Therefore, the dismissal of Count I, the private cause

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[9] Plaintiff's arguments ignore the important role Congress intended state governments to play in the regulation of state-chartered thrifts. "The [Senate] committee did not wish to take any action which would do violence to the balance between State and Federal functions and responsibilities which underl[y] . . . the dual savings and loan system." *Id.* at 3538 [bracketed comment added]; *see also FSLIC v. Fielding,* 309 F.Supp. 1146, 1149 (D.Nev.1969), *cert. denied,* 400 U.S. 1009, 91 S.Ct. 567, 27 L.Ed.2d 621 (1970) ("Congressional reports repeatedly emphasized the importance of the division of regulatory power between the national and state governments.")

> of action under HOLA, does not preclude recognition of or reliance on the common law remedy.

558 F.Supp. at 1132; *see also Sajovich,* at 77.

Although the reasoning of the district court on this point is not totally clear, the court in First Hawaiian Bank seems to suggest that the federal interest in savings and loan regulation requires recognition of federal common law duties. *See id.* However, this reasoning by the district court undercuts its earlier determination that the cited HOLA regulations do not support an implied right of action under *Touche Ross* and *Merrill Lynch. See id.* at 1130-31. The approach of the district court in *First Hawaiian Bank* is inherently contradictory since it suggests that even though Congress did not intend to imply a cause of action under HOLA, the federal interest as expressed in the Act and related regulations supports an action in federal court. The Court will not make an end run around the Supreme Court's decisions in *Touche Ross* and *Merrill Lynch,* which limited the courts' ability to imply rights of action, by invoking federal common law. Additionally, this approach would render the proviso totally moot.

C. Summary of Statutory Analysis.

In those counts brought in its capacity as conservator of Bohemian, the FSLIC cannot invoke subject matter jurisdiction under 12 U.S.C. § 1730(k)(1)(A); the "agency" section of the jurisdictional statute. Also, plaintiff cannot bring these actions under 12 U.S.C. § 1730(k)(1)(B), the federal question provision, to the extent it asserts the rights of Bohemian against the defendants. The proviso in the jurisdictional statute precludes the FSLIC from relying on subsection (B) to provide jurisdiction for counts I-XVI since it asserts only the rights of Bohemian. Additionally,

the allusion by plaintiff to duties imposed on the named defendants by federal regulations does not render the proviso inoperative. Despite these references, Counts I-XVI are state law breach of fiduciary duty and breach of contract actions.

II. Application of the Statutory Analysis to the Allegations in the Complaint

In Count I of the complaint, the FSLIC in its capacity as conservator seeks damages in excess of $56 million dollars from the director defendants for breach of duties imposed by federal regulations. This count is not an action by an "agency" for purposes of 12 U.S.C. § 1730(k)(1)(A) since the FSLIC sues in its capacity as conservator and asserts Bohemian's rights. Further, the proviso precludes plaintiff from invoking jurisdiction under subsection (B) of the statute. As a result, 12 U.S.C. § 1730(k)(1) does not provide for subject matter jurisdiction of this count. The Court does not have jurisdiction over Counts II and III of the amended complaint for the same reasons.

In Counts IV-XII, the FSLIC in its capacity as conservator of Bohemian seeks to recover assets the institution lost in a number of allegedly ill-advised business transactions. The FSLIC asserts that the defendant directors and, in Count IV, Attorney Fishman, breached various federal regulatory, Missouri statutory, and common law duties owed to the institution in consummating and approving these transactions. Despite citations to federal regulations, though, these actions are essentially state law breach of fiduciary duty and breach of contract actions. Although plaintiff also alludes to various agreements which it claims the defendants breached, these allegations do not provide for federal jurisdiction. To the extent the directors breached agreements with the institution, the

FSLIC as conservator of Bohemian, a state chartered institution, must rely on state law. *See FSLIC v. Elliott,* slip op. at 5, *citing, FSLIC v. Braemoor Associates,* 686 F.2d 550, 553-54 (7th Cir.1982), *cert. denied,* 461 U.S. 977, 103 S.Ct. 2086, 77 L.Ed.2d 297 (1983) ("When the FSLIC is acting in its role as receiver under state law, the applicable substantive law is state rather than federal."). To the extent the FSLIC as conservator asserts rights under agreements made by the FSLIC as a corporate entity, these allegations are surplusage which the Court cannot consider.

The FSLIC in Counts IV-XII cannot assert jurisdiction under 12 U.S.C. § 1730(k)(1)(A) since it brings these counts not in its corporate capacity but as conservator of Bohemian. Additionally, the proviso precludes plaintiff from claiming jurisdiction in this Court for these counts under subsection (B). The jurisdictional statute, then, does not provide for subject matter jurisdiction over Counts IV-XII. The plaintiff in Counts XIII-XVI brings suit in its capacity as conservator of Bohemian against specified directors for their alleged indiscretions as member[s] of certain corporate committees. The Court's analysis of the jurisdictional issues in Counts I-XII applies equally to Counts XIII-XVI. The jurisdictional statute does not provide for subject matter jurisdiction over these counts.

Although the movants limit their motion to dismiss to Counts I-XVI, the Court will consider on its own motion whether it has subject matter jurisdiction over the remaining counts. *See* Fed.R.Civ.P. 12(h)(3). The existence of jurisdiction over these other counts might provide pendent subject matter jurisdiction over some of the allegations in Counts I-XVI which do not have an independent jurisdictional basis.

Plaintiff asserts in Count XVII that Bohemian Chairman John Capozzi breached an Assistance Agreement "by

his acts and omissions set forth in Counts I through XVI." The FSLIC further contends that these actions rendered Bohemian insolvent, which injured plaintiff in excess of $30 million dollars. Since plaintiff brings Count XVII in its corporate capacity, the Court has subject matter agency jurisdiction over this action under 12 U.S.C. § 1730(k)(1)(A), and 28 U.S.C. §§ 451 and 1345. This count, though, cannot provide pendent claim jurisdiction for the other counts under *United Mine Workers v. Gibbs,* 383 U.S. 715, 724, 86 S.Ct. 1130, 1137, 16 L.Ed.2d 218 (1966); *see also* C. Wright, Law of Federal Courts § 19 at 106-07 (4th ed. 1983). The doctrine of pendent jurisdiction does not apply to plaintiff's allegations in Counts I-XVI against the defendants other than Chairman Capozzi because they are not parties to Count XVII. *Id.*

In addition, the Court has throughout this Memorandum distinguished between actions brought by the FSLIC in its corporate capacity and those brought in its capacity as conservator. As a result, while the FSLIC is nominally a plaintiff in Count XVII and Counts I-XVI, and Chairman Capozzi is a defendant in all of these Counts, the FSLIC cannot assert pendent claim jurisdiction for its allegations against Chairman Capozzi in Counts I-XVI under the federal jurisdiction it invokes in Count XVII. It brings Counts I-XVI in its capacity as conservator and Count XVII in its corporate capacity. For purposes of *United Mine Workers v. Gibbs,* then, the entity bringing suit in Count XVII is different than the plaintiff in Counts I-XVI, and the Court cannot assert pendent claim jurisdiction. *Id.* Further, the Court cannot properly invoke pendent party jurisdiction over plaintiff's claims in Counts I-XVI under the doctrine of *Aldinger v. Howard,* 427 U.S. 1, 3-19, 96 S.Ct. 2413, 2415-22, 49 L.Ed.2d 276 (1975); *see also* Wright, § 19 at 107-09.

In Count XVIII, the FSLIC in its capacity as conservator asserts that Chairman Capozzi breached a Guarantee Agreement in which he contracted to "provide Bohemian with an eleven percent (11%) yield on the book value of a 40-acre tract of land." Essentially, this count is a state common law breach of contract action and, correspondingly, 12 U.S.C. § 1730(k)(1) does not provide for jurisdiction in federal court. Plaintiff cannot invoke "agency" jurisdiction under § 1730(k)(1)(A) since it does not sue in its corporate capacity. As with the other actions brought by the FSLIC in its capacity as conservator, the proviso precludes plaintiff from asserting federal question jurisdiction under subsection (B).

Plaintiff asserts in Counts XIX that defendant Chairman Capozzi made a number of misrepresentations about his past in a Biographical and Financial Report he provided to the agency. The FSLIC contends that Capozzi in making these misrepresentations violated 18 U.S.C. §§ 1001, 1008 and 1014. Without considering whether this count states a claim for purposes of Fed.R.Civ.P. 12(b)(6), the Court notes that plaintiff has properly invoked "agency" jurisdiction for this count pursuant to 12 U.S.C. § 1730(k)(1)(A). But, plaintiff cannot use the Court's jurisdiction over this count as the basis for pendent jurisdiction for its allegations against Capozzi in Counts I-XVI. Again, for purposes of *United Mine Workers v. Gibbs,* the count XIX involves a different plaintiff than Counts I-XVI. 383 U.S. at 721-24, 86 S.Ct. at 1136-37. Further, the factual allegations in Counts I-XVI and those in Count XIX do not "arise from a common nucleus of operative fact." *Id.* at 724, 86 S.Ct. at 1137.

In Counts XX-XXIII, plaintiff alleges actions against Chairman Capozzi, Director Margaret Capozzi, President Wood, and Attorney Fishman under the Racketeer Influenced Corrupt Organizations Act (RICO), 18 U.S.C.

§ 1961 *et seq.* The Court has subject matter jurisdiction over these counts under 28 U.S.C. § 1331 and 12 U.S.C. § 1730(k)(1)(A) and (B). In addition, these counts provide for pendent claim jurisdiction under *United Mine Workers v. Gibbs* over plaintiff's allegations against defendants Chairman Capozzi, Director Capozzi, and President Wood in Counts I-XVI, against Chairman Capozzi in Count XVIII, and against Attorney Fishman in Count IV. Plaintiff in these RICO counts essential restates the factual circumstances alleged in Counts I-XVI and XVIII and, therefore, they arise out of a "common nucleus of operative fact." *Id.* Of note, too, plaintiff brings the RICO counts in its capacity as conservator as well as its corporate capacity. As a result, for purposes of *United Mine Workers v. Gibbs,* the Court has pendent claim jurisdiction over the plaintiff's claims in Counts I-XVI and XVIII against the Capozzis and Wood, and in Count IV against Fishman. The RICO counts do not provide a basis for subject matter juridiction over plaintiff's allegations in Counts I-XVI against the other director defendants, though. Similarly, while Count XXIV, in which plaintiff in its capacity as conservator seeks to impose a constructive trust over some of the Capozzis' assets, does not have an independent jurisdictional basis, the Court will exercise its pendent claim jurisdiction over this count.

Summary

The Court has subject matter jurisdiction over all of plaintiff's allegations against Chairman Capozzi, Director Capozzi, and President Wood. Additionally, the Court has subject matter jurisdiction over plaintiff's allegations against Attorney Fishman in Counts IV and XX-XXIII. However, the Court does not have subject matter jurisdiction over the FSLIC's claims against the other director defendants in Counts I-XVI.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 87-1696

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS CONSERVATOR FOR BOHEMIAN SAVINGS AND LOAN ASSOCIATION, APPELLANT

vs.

JOHN V. CAPOZZI, MARGARET A. CAPOZZI, DAN L. WOOD, VINCENT J. BOMMARITO, THOMAS F. CLINE, DANIEL L. DIERDORF, ROBERT C. FECHNER, FLOYD L. SHEARIN, JACOB FISHMAN, AND GREGORY SABAN, APPELLEES

Appeal from the United States District Court for the Eastern District of Missouri

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[Filed Aug. 24, 1988]

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

August 24, 1988

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 87-1696EM

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ETC., APPELLANT

v.

JOHN V. CAPOZZI, ET AL., APPELLEES

Appeal from the United States District Court for the Eastern District of Missouri

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Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Judge John R. Gibson did not participate.

Petition for rehearing by the panel is also denied.

November 4, 1988

Order entered at the Directon of the Court:
Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

U.S. GOVERNMENT PRINTING OFFICE 1989—241-699/00079